United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7453

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United States Court of Appeals

FOR THE SECOND CIRCUIT

KAHLMAN LINKER and DYNAMISMM,

Plaintiffs-Appellants,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., DEAN WITTER & CO., INC., GOLDMAN, SACHS & CO., WALTER F. BAUER, WERNER L. FRANK, FRANCIS V. WALKER, and all other executive officers and directors of INFORMATICS, INC., as of February 27, 1974, HENRY J. SMITH, former Chairman and Director, and all other directors of the EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, as of February 27, 1974, THE EQUITABLE LIFE HOLDING CORP., and all others whom discovery may show should be named,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFFS-APPELLANTS

KAHLMAN LINKER
Plaintiff-Appellant Pro Se
67 Broad Street
New York, N.Y. 10004

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Docket No. 76-7453

BRIEF FOR
PLAINTIFFS-APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PRELIMINARY

Plaintiffs, KAHLMAN LINKER and DYNAMISMM, appeal from:

(A) A final order (Werker, H.F.), entered on September 15, 1976, dismissing with prejudice the complaint herein for the reason that "plaintiff pro se has no beneficial interest in the matter of the merger which is the subject of the complaint herein;"

(B) An order (Werker, H.F.), entered on September 15,

1976, denying reargument of the complaint herein;

(C) An order (Werker, H.F.) which, as stated by the Court in the proceedings of September 8, 1976, indicated that he was not deciding "the question of preliminary injunction (against defendant EQUITABLE LIFE HOLDING CORPORATION) for the simple reason that it never has arisen;"

(D) A verbally transmitted order (Werker, H.F., through his Law Clerk) on August 31, 1976, denying to plaintiff his right to serve upon defendants MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., DEAN WITTER & CO., INC., and GOLDMAN, SACHS & CO. an Order to Show Cause for Summary Judgment, dated and endorsed by the Motions & Appeals Clerk on August 31, 1976;

(E) An order (Werker, H.F.) entered presumably on August 26, 1976, granting defendant, Equitable Life Holding Corporation and that defendant alone, a postponement until October 5, 1976, to answer plaintiff's complaint, in opposition to plaintiff's letter dated and delivered to the Court below August 26, 1976, on which letter the Court below refused to endorse, "Denied;" and

(F) An "unofficial" order (Werker, H.F.), presumably entered by the actions of the Court below during the proceedings of September 8, 1976, denying to plaintiff his right to answer a motion to dismiss, filed on September 7, 1976, and served on plaintiff before the proceedings on September 8, 1976, by Thomas J. Hanrahan, attorney for defendant, Merrill Lynch, Pierce, Fenner & Smith, Inc., "on the grounds that plaintiffs are not the real parties at interest; lack standing to sue; are engaged in the unauthorized practice of law; that the action is not a true pro se action; and for a non-joinder; or in the alternative, for a more definite statement."

QUESTIONS PRESENTED

(A) In the light of the evidence presented by plaintiff in the instant proceeding, did not the Order of Dismissal entered by the Court below contain a false statement of material fact; did not plaintiff pro se indeed have, at all times, "beneficial interest in the matter of the merger which is the subject of the complaint herein;" thus, did he not have, as plaintiff pro se in the proceeding below, standing to sue at all times; and thus, were not plaintiffs

in the proceeding below the real parties at interest at all times?

(B) However much plaintiff pro se is disinclined to disparage the conduct in the proceeding of the Court below, does not the weight of evidence show his actions to have been, at the very least, arbitrary, an abuse of discretion and not according to law; was not the justification for the order of dismissal with prejudice false and misleading and the order itself malicious; and does it not appear that the Judge below may have taken biased and ex parte cognizance of the subject matter of the proceeding near its very inception, and may have willfully or unwittingly acted upon serving and protecting the interests of defendant, Merrill Lynch, Pierce, Fenner & Smith, Inc., in ways that clearly denied plaintiffs and other individuals of small or moderate means their Constitutional rights to due process and equal protection of the law?

CONDENSED SUBJECT MATTER OF PROCEEDING BELOW

1. At a special meeting of stockholders, held on February 27, 1974, the stockholders of INFORMATICS, INC., a Delaware corporation, purportedly approved a "merger" of Informatics with Equitable Computer Corporation, a Delaware corporation and

wholly-owned subsidiary of Equimatics, Inc., itself a more than 90% owned subsidiary of Equitable Life Holding Corporation, a Delaware corporation and itself a wholly-owned subsidiary of THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES (hereinafter "The Equitable,") a New York corporation.

2. Plaintiffs possess evidence that the purported "merger" may have been a manipulative and deceptive device, without valid business or corporate purpose, contrived for self-dealing objectives by the management of Informatics, Inc., and The Equitable, the acquiring company, to appropriate solely for their joint benefit, and grievously at the expense of the non-management stockholders of Informatics, Inc., the entire stock ownership of Informatics, Inc., at a time and price arbitrarily and capriciously set by management and The Equitable, and by methods which would have been prohibited to the acquiring company had the purported "merger" been subject to the laws governing corporations incorporated in New York State.

3. Plaintiffs, in protesting at the special meeting of stockholders of Informatics, Inc., the arbitrary and capricious "freeze-out" of non-management stockholders by the management of Informatics, Inc., and The Equitable, were then aware only of false or misleading disclosure of material facts and the omission of disclosure of material facts in the Proxy Report for that meeting. Upon later probing, extending over many months, plaintiff became aware that:

(a) management's communications with stockholders of Informatics, Inc., in relationship to the forthcoming "merger," sent to stockholders prior to January 30, 1974, (the date of the Proxy Report for the Special Meeting of Stockholders) may also have been false or misleading with respect to disclosure of material facts;

(b) Merrill, Lynch, Pierce, Fenner & Smith, Inc., Dean Witter & Co., Inc., and Goldman, Sachs & Co. may have been acting in concert with the managements of Informatics, Inc., and The Equitable in arbitrary, capricious and illegal ways unfairly to treat the non-management stockholders of Informatics, Inc., with respect to such "merger;" and

(c) difficult as it may be even to imagine, there is irrefutable evidence that the Securities and Exchange Commission and its Corporation Finance Division (responsible for full and open disclosure in the Proxy Report) have been colluding with the above-named three securities firms and the management of Informatics, Inc., and The Equitable to violate the disclosure provisions of the Securities and Exchange Act, as well as their own (SEC) promulgated rules, to the grievous injury of the non-management stockholders of Informatics, Inc.;

(d) In addition to the clearly illegal, if not fraudulent, nature of the so-called "merger" device, there seems evidence to support a belief that election campaign contribution "bribery" and influence "peddling" may have been practiced by the securities firm defendants in obtaining from the S.E.C. acceptability of false or misleading disclosure in the Proxy Report soliciting stockholder approval of the purported merger; and "bribery" between the management of Informatics, Inc., and the securities firm defendants, the former having shown the willingness to breach management's fiduciary responsibilities to the Company's stockholders in return for self-dealing benefits, and so unfairly, if not fraudulently, freeze-out the Company's non-management stockholders to the unfair, if not fraudulent, advantage, also, of The Equitable Life Holding Corporation.

PROCEDURAL FACTS IN THE COURT BELOW

4. On August 11, 1976, plaintiffs filed their complaint in the proceeding below (76 Civ. 3543), alleging collusion to defraud stockholders in violation of the securities laws.

5. On September 15, 1976, the Court below entered judgment in favor of defendants and against plaintiffs in the above entitled cause (76 Civ. 3543 -- H.F.W.). As signed by Judge Werker on September 15, 1976, the Order of Dismissal states:

"It appearing to the Court that plaintiff pro se has no beneficial interest in the matter of the merger which is the subject matter of the complaint herein, the Court of its own motion makes the following order. . Dismissed with prejudice. . ."

6. On September 24, 1976, plaintiff-appellant wrote and delivered a letter to Judge Werker demanding that the Order of Dismissal be amended by deleting the "no" and inserting "only indirect" (in front of beneficial interest) in its place. Such demand was denied by the Court below on September 24, 1976, as is documented by Judge Werker's endorsement on plaintiff's letter to him of September 27, 1976 (appended as Exhibit A).

7. To retrace and describe the facts of the proceeding below chronologically: on August 27, 1976, plaintiff filed an Order to Show Cause for Preliminary Injunction against defendant, The Equitable Life Holding Corporation ("Equitable") endorsed by Judge Werker, requiring the service and filing of answering papers on or before September 3, 1976, and hearings before the Court on September 8, 1976.

8. On the morning of August 26, 1976, upon hearing from counsel for Equitable (the only defendant named in the Order to Show Cause for Preliminary Injunction) that he was making a motion that same afternoon before the Court to obtain a postponement for answering the complaint, plaintiff wrote and delivered to Judge Werker a hand-printed letter (after phoning the Court's law clerk

during the morning to advise her that an argument in opposition to such postponement would be delivered to the Judge's chambers early that afternoon).

A verbatim transcript of the hand-printed letter from plaintiff to Judge Werker, dated and delivered by 3:00 P.M. of August 26, 1976, is appended as Exhibit B. It is a document apparently having vital evidentiary value in plaintiff-appellant's instant cause of action, inasmuch as the receipt of it by the Court below seemingly marked a drastic change in the character of Judge Werker's conduct of the proceeding.

In fact, when, at a later date, plaintiff requested (through Judge Werker's law clerk) that he sign the letter with his order entered thereon, plaintiff was informed that the Court had declined to do so. When, even later, plaintiff requested the Court's law clerk to tell Judge Werker he had no alternative but to endorse, "Denied," on the letter, because he had approved postponement on defendant's motion, the law clerk's answer was, "The Judge still refuses to sign."

9. Upon belief at the time that Judge Werker had granted postponement to all defendants for answering the complaint -- with truly frightening consequences for the public interest (as is implied in plaintiff's letter to Judge Werker of August 26 -- Exhibit B)-- plaintiff on August 31, 1976, petitioned the Court for an Order to Show Cause for Summary Judgment against three of the eight defendants (Merrill Lynch, Pierce, Fenner & Smith, Inc.

("Merrill Lynch"), Dean Witter & Co., Inc. ("Dean Witter"), and Goldman, Sachs & Co. ("Goldman, Sachs"), they being parties directly involved in the subject matter of plaintiff's letter to Judge Werker of August 26, 1976.

After the Order to Show Cause had been approved and endorsed for procedural propriety by the Motions & Appeals Clerk, plaintiff, on the instructions of the Clerk, delivered the Order in the early afternoon of August 31, 1976, to Judge Werker's law clerk, Ms. Ganek, for the Court's attention. Shortly thereafter, Ms. Ganek came out in the hallway from the trial over which the Judge was presiding and heatedly informed plaintiff that Judge Werker would not approve the Order to Show Cause for Summary Judgment -- simultaneously thrusting the document back into plaintiff's hands, the Order being unsigned and unendorsed in any way except, "Received in chambers of Judge Henry F. Werker, August 31, 1976."

Plaintiff (as he recalls the conversation) believes Ms. Ganek then said, "The Judge never approves an Order to Show Cause for Summary Judgment until after defendants have answered the complaint." However, when plaintiff protested, "But Judge Werker has granted a postponement to defendants," the law clerk, seemingly embarrassed, admitted such was so; but she persisted in stating that the Judge would not reconsider or change his decision with respect to plaintiff's serving and filing the Order to Show Cause for Summary Judgment.

(Actually, Judge Werker's law clerk had apparently not been

aware that postponement to answer the complaint had been overtly granted only to one defendant, The Equitable. As the transcript of the proceeding of September 8, 1976, will confirm, none of the other defendants had been notified that Equitable had been granted a postponement; and Judge Werker at such proceeding made no effort to enlighten them accordingly that they, too, had been granted such postponement.)

On September 27, 1976, plaintiff wrote and delivered a letter to Judge Werker, requesting that he endorse on the front page of the Order to Show Cause for Summary Judgment (received in the Judge's chambers on August 31, 1976) his decision in respect to the document which had been transmitted to plaintiff from Ms. Ganek (signing, dating and making the document available for pick-up by plaintiff).

A facsimile of the original copy of the Order to Show Cause for Summary Judgment, received in Judge Werker's chambers on August 31, 1976, and as endorsed by the Motions & Appeals Clerk, is appended as Exhibit C. It is to be observed that Judge Werker's disapproval of service and filing (and his signature) are not endorsed on the document, plaintiff having been told by the Court's law clerk that such, procedurally, is not the rule, "The document is merely returned" (unendorsed).

10. Plaintiff received a telephone call from Judge Werker's law clerk, Ms. Ganek, early Friday afternoon, September 3, 1976, at which time she stated that the Judge wished to deliver a

message to him later that afternoon. At 4:45 P.M., Ms. Ganek phone again, stating that Judge Werker asked that plaintiff call as many defendant counsel "as he could get in touch with," and tell them the Judge would like each to be in attendance for a pre-trial conference in Room 312 on Wednesday, September 8, at 2:00 P.M. (the same time and place which had been set for hearing of plaintiff's Order to Show Cause for Preliminary Injunction v. Equitable).

Ms. Ganek, at that time, also told plaintiff he need not phone Merrill Lynch inasmuch as counsel for that firm had been "in the office" that afternoon and had already been advised about the forthcoming conference. Plaintiff told Ms. Ganek he had reservations about being able to make contact in time with the counsel for the three West Coast defendants, but was told he need only do his best. (Actually, plaintiff was able, directly or with the help of some defendant counsel, to notify all.)

11. Plaintiff arrived in Room 312 of the Courthouse well before 2:00 P.M. on September 8, 1976. When counsel for defendants also arrived, plaintiff served a copy of his Supplementary Brief in Support of Plaintiff's Order to Show Cause for Preliminary Injunction on Mr. Weinstock, counsel for Equitable; he deposited the verified copy of the Supplementary Brief with the Clerk of the Court, and was then served by Mr. Hanrahan, counsel for Merrill Lynch, with a Notice of Motion, an Affidavit in Support of Motion to Dismiss, and a Memorandum of Law in support of motion to dismiss, returnable before Judge Werker on September 24, 1976.

Merrill Lynch's motion for dismissal was "on the grounds that plaintiffs are not the real parties in interest; lack standing to sue; are engaged in the unauthorized practice of law; that the action is not a true pro se action; and for nonjoinder, or in the alternative, for a more definite statement."

To make certain the Merrill Lynch documents are in the record, plaintiff-appellant has appended them as Exhibit D.

12. By reading the transcript of the proceeding in Room 312 on September 8, 1976, (appended as Exhibit E) one may quickly form a crystal clear conclusion as to the true purposes motivating Judge Werker in having gathered this assemblage of all (but one) of defendant counsel. It must be remembered that all defendant counsel had been purportedly assembled for a "pre-trial conference," at the same time and place which had been set for hearing the Order to Show Cause for Preliminary Injunction (which involved only Equitable and plaintiff pro se, and no other defendants.)

The record will show that, unquestionably, Judge Werker's purposes were not those of adjudicating the Order to Show Cause for Preliminary Injunction.

Absolutely nothing was mentioned at the proceeding which could have had the slightest relationship to a "pre-trial conference." Thus, the Court's having asked plaintiff to get all defendant counsel together

for a pre-trial conference was indeed frivolously false and misleading.

Judge Werker willfully conducted the proceeding of September 8, 1976, solely as a star-chamber hearing of plaintiff pro se's right to be in the Court. He had granted plaintiff no notice, in fact, had misrepresented to plaintiff the purposes of the proceeding, he granted plaintiff extremely little opportunity to answer verbally, and no opportunity to prepare carefully for the Judge's charges against him, while conducting the proceeding as a "fishing" expedition which might reflect on, among other things, plaintiff's integrity.

Irrefutably, Judge Werker in the proceeding of September 8, 1976, had denied plaintiff his constitutional rights of due process and equal protection of the law. Plaintiff, of course, had been served directly before the proceeding began with Merrill Lynch's motion on the same subject matter. At the very least, due process required that plaintiff pro se be allowed to defend his standing to sue as plaintiff pro se on the date set for hearing of defendant Merrill Lynch's motion -- on September 24, 1976. Judge Werker's conduct of the hearing on plaintiff's standing to sue as plaintiff pro se was unquestionably an abuse of discretion, if nothing else.

13. On September 15, 1976, plaintiff wrote and delivered

to the Court below a Notice of Reconsideration in opposition to defendants' motion for dismissal with prejudice, requesting that dismissal (with prejudice) in the proceeding be withheld pending the refiling of the cause of action in two separate proceedings: one naming Merrill Lynch, Dean Witter, Goldman, Sachs and the Securities and Exchange Commission; and the other naming only The Equitable Life Holding Corporation.

In such notice letter, a copy of which is appended as Exhibit F, plaintiff stated he believed he had erred grievously in the interest of obtaining justice for his cause, in having named Merrill Lynch and the other two securities firms as defendants in the same proceeding with the Equitable. As a joint proceeding, Merrill Lynch and the other two securities firms were permitted "to benefit on purely technical grounds, from the fact that he may not, as pro se, have standing to sue the Equitable."

Plaintiff indicated that "there was no question but that he has standing to sue, as pro se, Merrill Lynch and the other two securities firms were he to initiate a separate action only against them."

Even further, in such notice letter of September 15, 1976, plaintiff stated his belief that "justice can be afforded only if, in a separate suit against the Equitable, plaintiff has the privilege of submitting a carefully prepared memorandum in opposition to defendant Merrill Lynch's motion to dismiss (for the reason plaintiff and DYNAMISMM do not have standing to sue as plaintiff pro se)."

It will be noted at the top of plaintiff's letter to the Court of September 15, 1976 (Exhibit F), Judge Werker summarily wrote, "Reargument denied, so ordered 9/15/76, Henry F. Werker, U.S.D.J."

14. On the morning of October 7, 1976, plaintiff received the notice of motion and affidavit of counsel for defendant Merrill Lynch to the effect that plaintiffs have failed to file a bond for costs on appeal as required by Rule 7 of the Federal Rules of Appellate Procedure; that the total costs on appeal will far exceed $250.00, the amount of bond specified under Rule 7; defendant therefore requests the plaintiffs, severally and jointly, to file a bond for costs on appeal in the amount of $2,500.00, or such other amount as the Court may d just, or in the alternative, for such other and further relief as is just and proper; and that defendant will make application for the above stated relief before Judge Werker at 9:30 in the forenoon of October 14, 1976. (Exhibit G-Appdx.)

Should Judge Werker order the filing by plaintiff of a bond exceeding $250.00, plaintiff must proceed in forma pauperis.

Judge Werker, to be sure, is aware of plaintiff's straitened financial condition. On lines 3 and 4 of page 18 of the transcript of the proceeding of September 8, 1976, it was indicated, "Kahlman Linker has lost all his money. I haven't the money to spend for an attorney."

But what plaintiff could have told the Court below at the

time was that Kahlman Linker lost his money as a result of malicious activities on the part of a group of people in and around the securities industry who felt that they could render him ineffective in his crusading activities against them by "breaking" him financially.

> Directly as a result of their malicious actions, plaintiff, on January 30, 1975, was indebted to members of his family and others in an amount in excess of $300,000, with offsetting assets having marketable value of less than $15,000.00. Such position contrasts with a net worth (as computed in plai iff's financial statement to his bank) of $1,954,000 as of April 9, 1972.

Plaintiff had been faulted only because he had trusted one having fiduciary responsibility who, having maliciously breached that responsibility, saw to it that plaintiff would not have money or credit enough even to litigate against the malefactors.

Plaintiff, thus, adopted attorney pro se status as the only option left to him. The facts of the proceeding in the Court below provide conclusive evidence that plaintiff's "adversaries" have been intent on closing down this one last option of his to obtain justice.

15. In order that the facts presented herein may be viewed in proper perspective, plaintiff must call the attention of this Court to his belief that infinitely more than just modest sums

of money are at stake in this proceeding.

> Merrill Lynch and the other two securities firms, for example, could well be charged with liability for damages in the subject matter of the Order to Show Cause for Summary Judgment which could aggregate $3 to $5 million dollars (computed on a single-damage basis at the very least); and much, much more dollarwise in another area of subject matter; without mention of possible criminal penalties.

Further, this Court should also be informed that, in the opinion of plaintiff, pro se, who has had a long record of successful publishing of investment services, the non-management stockholders of Informatics, Inc., were fraudulently forced to sell out their stock holdings at an unconscionably low price.

> The price all stockholders got for the total Common capitalization, as of the "merger" on February 27, 1974, was only some $11.5 million -- in extreme contrast with a realistic worth today of much more than $100 million for that Common capitalization.

Informatics, Inc., has become a tremendously important company and an unquestioned leader in its vital field; and its growth of profits in the period ahead can well become fabulous.

A

The Court's Justification for the Final Order of Dismissal with Prejudice (Werker, H.F.), entered on September 15, 1976, was false and misleading; and the Order must be reversed by this Court.

If, at the so-called "hearing" on September 8, 1976, the Court below had allowed plaintiff pro se the opportunity to explain, plaintiff's testimony would have irrefutably proved that plaintiff did, indeed, have "beneficial interest in the matter of the merger which is the subject matter of the complaint herein;" and that he did not need a power of attorney to represent the 1,000 shares of Informatics, Inc., registered in the name of Ruth T. Linker as of the time of the "merger."

Appended as Exhibit H is Ruth T. Linker's affidavit (certifying excerpt pages from her Last Will and Testament, dated October 27, 1972, and since unamended), which document has the effect of testifying that, at the time of the merger (February 27, 1974) her husband, plaintiff pro se, had beneficial interest in the 1,000 shares of Informatics, Inc., Common Stock which were registered in her name at that time.

> On page 3 of Mrs. Linker's Will is stated, "If my husband, KAHLMAN LINKER, survives me, my residuary estate shall first be divided into two equal shares, hereinafter called Fund A and Fund B. . and Fund A shall be distributed to my husband absolutely."

There could be no better precedent for establishing the truth that plaintiff's interest in the 1,000 shares of Informatics, Inc., stock (registered in Mrs. Linker's name) was indeed beneficial than the following opinion of General Counsel of the Securities and Exchange Commission (Release No. 34-1965, December 21, 1938, 11 FR 10967):

> "You put the case of an irrevocable personal trust, which holds an equity security listed on a national securities exchange and which from time to time has transactions in such security. The trustee of this trust is a director of the issuer of such equity security. The daughter of the trustee is entitled to the income of the trust until reaching a specified age and is then entitled to the corpus. The trust deed provides that if the daughter dies before reaching the specified age, the trustee is to become entitled to the corpus of the trust.
>
> "You inquire whether the trustee, under Section 16(a) of the Securities Exchange Act and Rule 16 a-1 (CFR 240.16 a-1), (formerly designated Rule NA 1) of the Commission, must file reports in regard to the above-mentioned equity security held in the trust. Under these circumstances the trustee should in my opinion report the holdings and transactions of the trust as his own, indicating the nature of his interest." (Emphasis supplied.)

Even apart from the testimony in Mrs. Linker's Will, plaintiff pro se can add substantially to evidence that the unique relationship that has always existed with respect to Mrs. Linker's investments and her husband's handling of them clearly establishes his beneficial interest in the stock of Informatics, Inc., at the time of the "merger." However, plaintiff will not burden this Court with those arguments, believing the opinion of the General Counsel of the SEC (supra) to be conclusive.

This Court must stay and reverse Judge Werker's Order of Dismissal of September 15, 1976, or, in the last alternative, must

grant plaintiff's right to answer and have adjudicated defendant Merrill Lynch's motion for dismissal, for the reason that plaintiff had no standing to sue as pro se, etc., filed with the Court below on September 7, 1976, and ordered to be heard on September 24, 1976.

B

The matter of the Order to Show Cause for Preliminary Injunction v. defendant, Equitable Life Holding Corporation, served and filed by plaintiff on August 27, 1976, must be reheard by this Court and adjudicated on the merits of the papers and verbal arguments completed by both parties.

The Court below acted with abuse of discretion in not deciding the question of preliminary injunction "for the simple reason that it never had arisen." The time and place of the proceeding had been ordered by the Court for the specific purpose of deciding the question of preliminary injunction; and, unquestionably, plaintiff pro se had standing to sue Equitable at that time, and at all times with respect to the subject matter of this proceeding.

In the proceeding of September 8, 1976, defendant, Equitable, urged only the denial of plaintiff's motion for preliminary injunction. Equitable did not speak to or join the motion for dismissal for the reason that plaintiff had no standing to sue, etc. (See Exhibit E of Appendix: page 14, lines 10 through 19). At no point in defendant Equitable's papers was the good faith of plaintiff questioned in asserting his standing to sue as pro se.

Justice, thus, cannot be afforded plaintiff and the other non-management stockholders of Informatics, Inc., if the proceeding of the Order to Show Cause for Preliminary Injunction is not expeditiously reheard by this Court and adjudicated on its merits. Such must apply even in the unexpected eventuality this Court does not reject and reverse the Order of Dismissal.

The vital interests also of defendant Equitable depend on such expeditious resumption and adjudication of the Order to Show Cause for Preliminary Injunction. Equitable, as a fiduciary institution, would suffer disastrously if the serious charges which have been leveled against it were settled by an Order of Dismissal only because plaintiff had no standing to sue as pro se -- charges which in no way run to the merits of the proceeding. Not only is the infinite vitality of the institution's reputation at stake, but there is need on the institution's part to establish that, should fraudulent activities in the subject matter of this proceeding be found to have existed, no responsibility for such activities, certainly willful ones, can be laid at its door.

Only by an adjudication of the proceeding on its merits can Equitable prevent the liability for, embarrassment from, and costs of multiple suits in this and other jurisdictions which could-- and undoubtedly would -- be brought by others who were stockholders of Informatics, Inc., at the time of the "merger."

C

The Motion to Show Cause for Summary Judgment v. defendants, Merrill Lynch, Dean Witter and Goldman Sachs, moved before the Court below on August 31, 1976, and arbitrarily and with abuse of discretion denied by the Court, must be expeditiously granted by this Court and the proceeding adjudicated on its merits.

Plaintiff's motion to show cause for summary judgment complied in all respects with Title 28, U.S. Code, Rule 56, and was endorsed for procedural propriety by the Motions & Appeals Clerk who instructed plaintiff to submit it to Judge Werker's law clerk for the Court's endorsement. Judge Werker, through his law clerk, verbally denied plaintiff service (on defendants) and filing of the document -- an act that was arbitrary, an abuse of discretion and not according to law -- denying plaintiff and other non-management stockholders of Informatics, Inc., their constitutional rights of due process and equal protection of the law.

The reason transmitted by the law clerk for the Court's not granting the motion in no way reflected due consideration of the content or procedural impropriety on the part of plaintiff. Plaintiff can ascribe the Court's unwillingness to grant service and filing of the motion merely to have been a function of the Court's continuously manifested sympathy for defendants' cause of action.

The Federal Courts have uniformly held that the discretion to grant or refuse the summary judgment relief is a judicial discretion and must find its basis on good reason, and is subject

to appellate review in proper cases. Marion County Cooperative Ass'n. v. Carnation Co., 20 FR Serv 762, 214 F.2d 557 (CA 8th, 19[illegible]; Gross v. Southern Ry. Co., 13 FR Serv 2d 1243, 414 F. 2d 292 (CA 5th, 1969); Kimble v. Anderson-Tully Co., 21 FR Serv 725, 10 FRD 502 (DCED Ark., 1955); Federal Glass Co. v. Loshin, 20 FR Serv 808, 217 F. 2d 936 (CA 2nd, 1954)

In the Marion County Cooperative Ass'n. case, supra, motion for summary judgment by defendant in treble-damage anti-trust suit will be granted where it is clear from affidavits and depositions filed by defendant that no genuine issue of material fact exists as to any of the facts stated therein and the plaintiff rests on the unsupported allegations of the complaint.

In Gross v. Southern Ry. Co., supra, it was ruled that, in considering a motion for summary judgment the court has no duty or function to try or decide factual issues. Its only duty is to determine whether or not there is an issue of fact to be tried.

In the Kimble case, supra, the court in passing on a motion for summary judgment may not try disputed questions of fact but may ascertain only whether or not genuine issues as to material facts exist.

On August 31, 1976, the Court below returned the show cause order within no more than five minutes after it had been given his law clerk, even though he was presiding over a trial at the time it was submitted to him. He could not have exercised due effort to consider whether or not the document did or did not appear to

disclose if any genuine issue of material facts exist. Actually, his law clerk indicated that the Court's reason for not granting the motion was in no way related to anything stated within the document.

In Federal Glass, supra, it was held that an order denying a motion for summary judgment is appealable if the complaint seeks injunctive relief.

This Court must expeditiously grant plaintiff's motion to serve on defendants Merrill Lynch, Dean Witter and Goldman, Sachs the order to show cause for summary judgment verbally denied by the Court below on August 31, 1976, or order a rehearing of that matter with a trial by jury.

D

CONCLUSION

The District Court clearly erred in its basis for dismissal and in refusing to consider the segments of the complaint as separate proceedings. It conducted itself arbitrarily, with abuse of discretion, in not having adjudicated the matter of the motion for preliminary injunction against Equitable, the arguments by both parties having been completed. The Court below further conducted itself arbitrarily, with abuse of discretion and not according to law in having denied plaintiff's motion for summary judgment against Merrill Lynch, Dean Witter and Goldman, Sachs.

The order appealed from must be reversed, the motion for preliminary injunction expeditiously adjudicated on its merits, the securities firm defendants directed to file responsive answers to the motion for summary judgment within the time limited by law, with costs, and grant such other and further relief as this Court may deem just and proper.

Respectfully submitted

KAHLMAN LINKER
Plaintiff-Appellant Pro Se